In the Supreme Court of the United States.

OCTOBER TERM, 1904.

JOSEPH RALPH BURTON, PLAINTIFF in error,
v.
THE UNITED STATES.
No. 343.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

SUPPLEMENTAL AND REPLY BRIEF FOR THE UNITED STATES.

The nature and importance of the case seem to justify fuller treatment in this supplemental and reply brief than would ordinarily be necessary or appropriate.

I.

As to the nature of the offense, whether felony or misdemeanor, and the right of challenge.

In approaching the question of the nature of this offense, two or three points should be borne in mind. In the first place, that there have always been in the law two ideas on the subject, one regarding the essential character of the act as very grave or less so, as

shameful *per se* or otherwise, and the other considering the punishment imposed, not so much as the *only* test, but as a significant test.

In England there has always been a leaning, it seems, to the test of the essential nature. The graver crimes, like murder, burglary, arson, were felonies *per se*, and not simply because the punishment imposed marked them as such, involving forfeiture of property, life or limb, and civil disqualifications. So true is this that by the modern statute of 24 and 25 Victoria, chapter 96, section 46 (1861), the only crime denounced and defined as infamous is one the shameful nature of which is revealed when it is named. That is, some crimes are infamous *per se;* some carry an ignominious or infamous punishment.

Second, it should also be borne in mind that the offense of section 1782 is one of those lying (legally) among the lighter phases of *crimina falsi*, embracing frauds and breaches of trust, private or public, which not so very long ago were not regarded as crimes at all, or even misdemeanors, which were elusive and hard to seize, which involved simply civil liabilities and damages and which only in recent years have been carried over from mere breach of trust or impropriety into the class of offenses and misdemeanors. From the old point of view they were minor offenses, and it is only the modern conscience, especially in relation to civic and public duties, which regards them as grave. It can not be doubted that such offenses *are* most serious, but I emphasize the point that in the predilections of the criminal law they are matters of

evil *demeanor* rather than sinful crimes. This statute is the culmination of that modern evolution applied to our public life.

Again, every man is equal in the eye of the law. Almost any offense which is the subject of information and indictment might properly enough bear the consequences of the usual civil disqualifications. Many do, which are cognate with the present one (R. S., secs. 1781, 1788, 1789, 3890, 5334, 5408, 5449, 5499, 5500, 5501, 5502). Some of these are denominated misdemeanors in the respective statutes. All of them are mere misdemeanors. The law, charging a man with an offense and convicting him, marks the community's reprobation, which is the necessary and deterrent consequence of misdeeds, by putting the stigma upon the convict that he is not fit to take part in the community's affairs and enjoy these particular privileges and immunities. But certainly we must regard this "infamy" without respect of persons. Because a man occupies a high position and the sting of the infamy may therefore be more bitter to him is no reason for saying that that part of the punishment should increase the grade of the offense and enlarge his protection and rights, any more than if the case put the same stigma upon a poor wretch who never held office and could never expect to.

If a man does the wrong act, the public disgrace is a punishment especially fitting this offense. If a public servant commits this peculiarly public offense, being against the entire community, it is precisely appropriate that he should be disqualified for the public service. He has this stigma in view all through as a penalty if he

offends, and the bar should not be regarded in an isolated way and *per se* to magnify the offense in its technical bearings. The nature and grade of the offense should be determined by its essential elements, and the dishonor be regarded merely as a natural consequence of the commission of that particular misdemeanor.

I am aware that in respect to the right of presentment by grand jury under the fifth amendment to the Constitution the court has said (e. g., *Ex parte Wilson*, 114 U. S., 417, 428) that for more than a century imprisonment at hard labor in a penitentiary has been considered an infamous punishment in England and America, and unless that ignominious penalty with its accompaniments is infamous there is now no infamous punishment other than capital. But I submit that these views and other similar views expressed by the court ought not to rule the present question, which relates not to the constitutional guarantee of indictment by grand jury, but to the statutory right of challenge. And, besides, are felonies and crimes bearing an infamous punishment coterminous at all points?

I submit that this is not a felony; that it is a misdemeanor in name and nature, a misdemeanor pure and simple, as Judge Adams calls it, and that the defendant was therefore only entitled to three challenges and not to ten, as having committed a felony, under section 819. That section provides:

> When the offense charged is treason or a capital offense the defendants shall be entitled to twenty and the United States to five peremptory challenges. On the trial of any other felony the defendant shall be entitled to ten and the United States to three peremptory challenges; and in all other cases, civil and criminal, each party shall be entitled to *three* peremptory challenges; * * *

But section 1782, which creates the offense and prescribes the punishment, also specifically classifies the offense as a *misdemeanor*. Being so denominated by Congress, the mere fact that infamous punishment is attached does not raise the offense to the grade of felony. The Constitution does not fix the number of challenges to which a person shall be entitled when placed upon trial for any felony or infamous offense. If the offense be capital or infamous, a person shall not be held to answer, except upon the present ment or indictment of a grand jury (Art. V), and he shall enjoy the right to a speedy trial by an impartial jury (Art. VI); but the Constitution does not direct how the jury shall be impaneled or as to the number of challenges a person shall enjoy when put upon trial. The jury shall be *impartial*, and he may challenge any number for cause. But the right of arbitrary challenge, without cause, is regulated entirely by statute.

In the crimes act of April 30, 1790 (1 Stat., 112), by section 30 a person accused of treason was permitted to challenge peremptorily 35 jurors, while a person on

trial for a capital offense might challenge but 20. No provision was made for such challenges in other cases.

In the act of July 20, 1840 (5 Stat., 394) Congress authorized the courts of the United States "to make all necessary rules and regulations for conforming the designation and empaneling of juries, in substance, to the laws and usages now in force" in the respective States. That statute came before this court for construction in the case of *United States* v. *Shackleford* (18 How., 588). There the defendant was charged with a misdemeanor and the question arose, in empaneling the jury, whether the prisoner was entitled to any peremptory challenges. Speaking with respect to the power conferred, the court, Mr. Justice Nelson delivering the opinion, says (p. 590):

> The court is of the opinion that the power conferred upon the Federal courts to adopt "rules and regulations for conforming the designation and impaneling of juries to the laws and usages in force at the time in the State" enables them to adopt the laws and usages of the State in respect to the challenges of jurors, whether peremptory or for cause, and in cases both civil and criminal, with the exception, in criminal cases, of treason and other crimes, of which the punishment is declared to be death.

This exception thus made in capital cases was put upon the ground that the right of peremptory challenge had been expressly conferred by the act of 1790.

Under that law if a State should not permit peremptory challenges in felonies not capital, then no such

right would exist upon a trial for such a felony in the Federal courts. That is, the express Federal rule and right is purely statutory.

By the act of March 3, 1865 (sec. 2, 13 Stat., 500), Congress reduced the number of challenges to which a person should be entitled upon trial for a capital offense; and by the act of June 8, 1872 (17 Stat., 282), Congress amended the act of 1865 by providing the rule preserved in section 819.

In *Bannon and Mulkey* v. *United States* (156 U. S., 464) the defendants had been convicted of an offense named in the statute as a misdemeanor (sec. 5440), the punishment for which was a fine not exceeding $10,000, or imprisonment not exceeding two years, or both fine and imprisonment. Mr. Justice Brown delivered the opinion. After speaking of offenses being made *felonies by statute* (p. 466), he says, page 467:

> Neither does it necessarily follow that because the punishment affixed to an offense is infamous the offense itself is thereby raised to the grade of a felony. The word "felony" was used at common law to denote offenses which occasioned a forfeiture of the lands or goods of the offender, to which capital or other punishment might be superadded, according to the degree of guilt. (4 Bl. Com., 94, 95; 1 Russell on Crimes, 42.) Certainly there is no intimation to the contrary in Mackin's case, which was put wholly upon the ground that, at the present day, imprisonment in a state prison or penitentiary, with or without hard labor, is considered an infamous punishment. If such imprisonment

> were made the sole test of felonies, it would necessarily follow that a great many offenses of minor importance, such as selling distilled liquors without payment of the special tax, and other analogous offenses under the internal-revenue and customs-revenue laws, would be treated as felonies. * * * By statute in some of the States the word "felony" is defined to mean offenses for which the offender, on conviction, may be punished by death or imprisonment in the State prison or penitentiary; but in the absence of such statute the word is used to designate such serious offenses as were formerly punishable by death or by forfeiture of the lands or goods of the offender.

Reagan v. *United States* (157 U. S., 301) was a prosecution for a violation of section 3082, Revised Statutes, the punishment being a fine not exceeding $5,000 or imprisonment not exceeding two years or both. That statute does not classify the offense. The defendant claimed ten peremptory challenges, but the trial court held otherwise and the case came before this court for review. Mr. Justice Brewer delivered the opinion. After quoting with approval the language of the court in the *Bannon* case and speaking with respect to the classification of offenses, he says (p. 303):

> But in this case we need not refer to the common law for a classification of the offense. Section 2865, Revised Statutes, provides that "if any person shall knowingly * * * smuggle, etc., every such person * * * shall be

> deemed guilty of a misdemeanor. * * * By this section smuggling is *in terms declared a misdemeanor*. The penalty imposed is substantially the same as that by section 3082. * * * The latter offense is subordinate to the former. It therefore can not be an offense of a higher grade.

There is plainly in this a recognition of the right of Congress to classify offenses, and that such classification determines their character for the purpose of fixing the number of challenges allowed under section 819.

In *Considine* v. *U. S.*, 112 Fed. Rep., 342, a prosecution for a violation of section 5478, Revised Statutes, which provided a fine not exceeding $1,000 or imprisonment not exceeding five years, it was contended that the offense charged was a felony, which entitled the defendant to ten peremptory challenges. The statute did not classify the offense. Mr. Justice Day (then circuit judge) delivered the opinion of the court of appeals. After pointing out the changed situation with respect to the test of what constituted a felony, and referring to the classification which, by statute, has been adopted in most of the States, he says, page 345:

> Congress would have relieved the situation of much uncertainty had the general practice in state legislation been followed in dividing crimes according to punishment between the grades of felonies and misdemeanors. As this has not been done, and as there is no definition of felony in the statutes of the United States, its meaning must be ascertained from the construction given to the term in Federal decisions of authority.

> From such authorities certain general rules may be said to have been established. *When a statute says that a certain offense shall be a misdemeanor that fixes its character for the purpose of determining the number of challenges to which the accused is entitled, regardless of the original character of the offense.* (Citing cases.)

Speaking with respect to whether the offence was a statutory one, or one at common law, he continues, bottom page 345:

> The present offense was created by the law of the United States for the purpose of punishing the offense of breaking or attempting to break into a post-office or post-office building with the intention to commit therein larceny or other depredation, and it is purely a statutory offense, not of common-law origin.

The judgment of conviction was therefore affirmed. An application for certiorari was made to this court, but the petition was denied (184 U. S., 699).

The same rule was expressly announced in *Jewett* v. *U. S.*, 100 Fed. Rep., 832, 840, and in *Tyler* v. *U. S.*, 106 Fed Rep., 137, 138.

In this connection see also *U. S.* v. *Coppersmith*, 4 Fed. Rep., 198, et seq.; *U. S.* v. *Daubner*, 17 Fed. Rep., 794, 795.

The offense for which Senator Burton stands convicted is purely a statutory offense, not known to the common law. In creating the offense Congress had the right to designate it a felony or misdemeanor as it saw fit; and, having designated the offense a misde-

meanor, Burton was only entitled to the number of peremptory challenges provided for that class of offenses by section 819, to wit, three.

But the plaintiff in error is not in a position to avail of this objection. He made the objection simply as a formality before the trial began (Rec., p. 27), being inclined, I suppose, at that time to repudiate technicalities. He never renewed it. To entitle him to take advantage of the point here, he must have exhausted his three challenges and then proceeded to renew the demand by making further peremptory challenges. (*Insurance Co.* v. *Hillman*, 188 U. S., 208, 211, 212; *State* v. *Fournier*, 68 Vt., 262, 266; *Allen* v. *Waddill*, 26 S. W. Rep., 273). The record does not show that he either exhausted his three challenges or renewed his demand. The record fails to disclose any complaint against any juror chosen to try the case; and for aught that appears the defendant was entirely satisfied with the jury as constituted. The right to challenge is the right to reject, not to select a juror; and if from those who remain an impartial jury be obtained, the constitutional right of the accused is maintained. (*U. S.* v. *Marchant*, 12 Wheat., 480, 482; *Hayes* v. *Missouri*, 120 U. S., 68, 71.)

II.

As to the reality of the offense; the indictment, the proof, and the court's charge.

I was technically wrong in denominating Mr. Harlan, a witness for the defense, as an *unwilling* witness, but I was referring to his cross-examination, and he was

unwilling, as well as cautious and reserved toward the endeavor to elicit the terms of the original arrangement with Burton relative to services before the Post-Office Department.

I ask the Court's especial attention to what now follows, showing what the indictment charges and what the proof as to Burton's acts reveals, and how the court applies the law to these essential elements of the case.

The indictment charged that Burton accepted compensation for services between November 22, 1902, and March 26, 1903, rendered to the Rialto Company before the Post-Office Department in a matter pending there in which the United States was interested, viz, the matter being the inquiry whether the Rialto Company had violated section 5480 and a fraud order should therefore be issued, and the services consisting of visits, representations, and statements made to the Postmaster-General and other officers of the Department with the intent of inducing a decision favorable to the Rialto Company on the pending inquiry.

The record shows that Mr. Harlan knew on the train of the first two complaints (Rec., pp. 34–35), because he says so. He was asked (p. 176) by Judge Krum whether at the time Burton was employed he himself knew of the complaints which had been lodged. He answers that he is unable to say positively whether he did or not. On cross-examination (p. 189) he says that he evidently did know when he employed Burton that complaints were pending. Not only were the two complaints specially referred to in argument filed at that time (November 17, 1902), but Fravel's complaint

(pp. 54–56) was also before the Department. On December 29 the Allen complaint was received (p. 36, containing inclosures shown pp. 37–50). On January 17 the Warner complaint was filed (p. 52).

On the train Harlan discussed the Rialto Company's business and its relations to the law (p. 172). Senator Burton asked distinctly in that connection, "How are you going to keep within the Federal law?" and the answer was, "Simply by preventing misrepresentation." It is inconceivable that Harlan did not mention the complaints and inquiry which he knew were pending.

Still referring to the conversation on the train and the view of the relation which it left on Harlan's mind, and in answer to the questions if they wanted information as to whether a post-office inspector had been sent to investigate the Rialto Company, and if there were complaints lodged against that company under the terms of the employment would they feel that they had the right to call upon the Senator at Washington, and in reply to the question whether they did not in fact exercise that right and take that step, Harlan replied (p. 184):

> Now, it seems to me I can best answer that question by saying that if such a condition had arisen I would undoubtedly have addressed an inquiry to Senator Burton, leaving it to him whether he would have acted upon it or not. I have always regarded him as a Senator, Colonel Dyer, and I have respect for him as such.

In Harlan's letter of November 18 (pp. 91–93), after showing Dennis's connection with the Brooks Company and asserting his innocence, he asks Burton to find out whether the Government intends to make a case against Dennis, and says if he can make inquiries he will perform a great service "for us" at this time. Dennis was president of the Rialto Company, which would be served materially by friendly representations in Dennis's favor at the Department.

In Burton's reply (p. 94) he speaks of the first two complaints. His letter is in answer to Harlan's, and if it is not responsive it is not because he had not received Harlan's letter when he wrote it, because he acknowledges that letter. Why should he volunteer anything about complaints unless in pursuance of his arrangement on the train? The fact that he particularizes those complaints and speaks of them as if they were an entirely new matter to his mind and an unexpected find is quite consistent with his previous knowledge that there *were* complaints. Mr. Harlan naturally would not mention the names of complainants in advising Burton in a conversation on the general subject that the Rialto Company was under investigation, and Burton, knowing of complaints in general and an investigation, would naturally enough post to Harlan the precise information which he obtained. The letter shows that Burton assumes he is transmitting information which Harlan already knows. Burton was certainly not surprised at the result of his inquiries. He also says: "I have arranged with the Department to be advised in case any complaints are made against

your company, and have arranged for a hearing if any hearing should become necessary. I have assured the Department that it is the purpose of your company to comply strictly with the law, and that it is your desire to remain at all times in perfect harmony with the Department. No action of any kind will be taken against you without my first being notified, and every opportunity for a full explanation or hearing will be had."

In Harlan's answer to this letter (p. 175) he says that the claims or complaints have been investigated and the local inspector found the actions of our company all right and made a report in its favor. It does not appear that a report was made in the company's favor. It was orally reported by Price, the under inspector, to Inspector Dice, that these two complaints standing alone did not warrant the issuance of a fraud order. See what Dice says (p. 70), and what Price himself says (p. 202).

The same witness (Price) shows (p. 204) that after the Evans and Hout complaints he made inquiry on some complaints that came in during the interval before July. He would "probably go down there," to the company's office, and make inquiry as to their standing and what the condition was. He appears to have gone to Mr. Harlan for all of his information, and to have asked whether they had transactions with the people complaining, and that was about all. Mr. Price does not seem to have been a very vigilant or thorough inspector.

In Harlan's letter of December 2 (p. 135) he shows that the Post-Office investigation of the Rialto Com-

pany had become notorious; that that, in connection with the indictments against Dennis, Garland, and Brooks, would probably bring numerous complaints to Washington, but that they would be able to meet each one of the cases individually and show the Post-Office Department a clean record. He adds: "At your end of the line you will, of course, use your own judgment in handling the situation. We will at all times be glad to observe any request made by the Post-Office Department, or submit to any examination that they may direct." In this manifestly he was not referring to Burton's engagement to defend Dennis, but to Burton's services to the Rialto Company at the Department.

Harlan's letter of December 3 (p. 137) speaks of the Bowman and Shove episode, which deepened the perplexities of the company, and to which he refers when he says: "If the situation gets no worse than it now appears, the Rialto Company will have but little trouble in getting through with the situation. Will keep you fully informed."

In Burton's reply of December 9 (p. 136), in saying that no instructions whatever about the Rialto Company have gone out from the Department, he manifestly means that a fraud order had not been issued. When he says that "there is nothing in this office against you at this time," he means that. The next sentence of the letter shows that he is fully aware of the complaints sent forward to St. Louis, but he regards them as not in the Department, but in the hands of Mr. Dice. It is in this letter that he says: "I will

take care of things at this end of the line. Please keep me constantly advised."

When Burton saw the officers of the Post-Office Department on December 16 (pp. 118, 119, 141), he had met Dennis with Mahaney the night before at a hotel here. Burton asked about the conduct of the Rialto Grain and Securities Company and the rules governing marginal trading. When he took Dennis to see Cochran the next morning and repeated the assurance that the Rialto Company was endeavoring to do a straight business and that all the trouble arose from the conduct of the Brooks Company, he could not have had the purpose of serving Dennis in respect to the indictment or keeping the Department in good humor with him on that account. The indictment had already been found. Considering its origin, *it* constituted an accusation, or charge, or controversy, or proceeding in which the United States was a party or interested, and therefore Burton could not serve Dennis there consistently with the law. From another point of view, any service rendered to Dennis in respect to the indictment, as suggesting a man unjustly accused whose case ought to be nolle prossed, would have led him rather to the Department of Justice. No; Mr. Burton was serving the Rialto company by this introduction of its president, although he was under indictment, by exhibiting him as a fine man and repeating the assurance that the Brooks company was a bad concern and the Rialto company a good one (p. 141).

I have commented already on the interview between Burton and other counsel and officers of the company at St. Louis on December 24, in reference to which the fact was brought out that other counsel did not wish him to appear on the trial of the Dennis indictment because it might detract from his influence with the Post-Office Department (pp. 178, 186, 228; see also pp. 29–30 of the original brief).

On January 24 occurred the interview with Cochran with reference to surrendering the Brooks company books and records which the Rialto company owned and which were held by Dice for turning over to the State authorities (pp. 141, 143, 222). Since these books were part of the Rialto company's plant in their illegitimate business, and as they appear to have embraced records or lists of addresses in that business all over the country, they might have been a very material aid to the Government inquiry on the fraud order. They were in the hands of the Government authorities. The case against Dennis on the Brooks Company business in the Federal courts, it is true, was over, but Federal indictments were pending against McRae, Garland and Dennis growing out of the business of the Rialto Company (p. 197). The Government might discover the importance of those records in the fraud order inquiry or on these indictments, which were manifestly related to it. It was safer to have the books back in the Rialto Company's possession, and Mr. Burton appears to have secured their return by his persistence.

It is shown by Burton's telegram of February 11 (p. 125) that through his efforts "the Indian Commissioner will wire to-day to see if McGowan is in St. Louis, and will make inquiry of him why he is taking such proceedings." On the same date (p. 139) Burton acknowledges a telegram of Harlan's saying that things were satisfactory between him and Dice—that is to say, the Rialto Company at their end of the line were holding the situation down successfully. He says:

> Be sure and keep me advised if there is anything to do at this end of the line before going away. I have tried to keep the Department in a good humor with Major Dennis, and think I have succeeded.

As the indictment against Dennis was tried, and Dennis acquitted on or about January 14 (p. 179), the reference in this letter to keeping the Department in a good humor with Dennis must of necessity refer to him as president of the Rialto Company and to that company's interests. All of the ways in which Senator Burton kept the Department in a good humor with Major Dennis doubtless do not appear in this record.

On February 25 Mahaney telegraphed Burton and asked him to verify and advise the Rialto Company as to the report that special inspectors had been appointed to investigate the company. Burton made the inquiry. On the same page of the record is his answer that there is no complaint in the Department (which is not responsive to the inquiry of the telegram), and that he will write full particulars by mail. He did so, and that letter, with another confirmatory of his telegram

concerning the standing of McGowan, the Indian agent, with his superiors, was destroyed by Mahaney at Burton's request (p. 122).

The ground upon which Burton wished the letters to be destroyed is shown in the history of the case in my main brief, and reference is made there to the fact that a letter or letters which he had written to Harlan were also destroyed by Burton himself (pp. 180–181)

What does it ordinarily mean when letters are destroyed? That the person procuring their destruction is conscious of doing something wrong. In this case it can only mean—in view of the defendant's protestations that he meant to do nothing wrong at all—a confession that his acts were inconsistent with his words, that he had done wrong and violated the statute. I do not think Mr. Burton feared ordinary public criticism of mere unwisdom and indiscretion on his part as a public representative.

In the interview at St. Louis, on March 26, with Mahaney and McRae (pp. 120, 162), Burton says himself there is nothing pending in the Department of a serious nature against the company; that the situation there is cleaned up. It is for this reason, since he has left Washington and there is nothing more to do, that he terminates his connection with the company.

Is this record a chronicle of slight things, of mere suspicions and inferences on the part of the Government, of unimportant services, innocent in themselves, unrelated to the inquiry pending before the Post-Office Department, and which the law does not forbid?

Remembering these facts, what were the court's rulings during the trial and in the charge to the jury?

As to the initial phase, Judge Adams charged over and over again in different forms (e. g., pp. 33, 51) that the letters of complaint are "the basis of a proceeding. * * * The only question is whether there was an inquiry pending before the Department." "They are admitted simply because they bear upon the question and upon the nature of the inquiry, and for no other purpose" (p. 53).

As to the contract, the court said (p. 98):

> Now, under the law this defendant is not guilty for making a contract to do anything. This defendant is guilty if he receives money, receives any compensation for services rendered before the Department in a matter in which the United States is interested in any way. So that whatever be the true construction of the original contract entered into between the defendant in this case and the Rialto Grain and Securities Company, the question is still open whether as a matter of fact he received money from the Rialto Grain and Securities Company for services rendered before the Department by him. * * *
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> There is evidence to be left to the jury, not only of importance in itself, but of reasonable inferences that may be drawn from it, from which the jury may even be able to find that the contract contemplated this; and certainly it would not do for the court, in passing upon the admissibility of the evidence, to say that that would not be a fair and reasonable inference,

> neither do I intend to intimate that it would be, but simply that it is a matter for the jury to pass upon what the original contract was between the parties, whether it contemplated in terms actual work in the Post-Office Department or whether * * * the contract was made not to cover services before the Department, but with the actual intention of rendering them. All this must be left to the jury.

Then follows the passage on page 99, in which the court suggests that it is a service if a Senator of the United States goes before an Executive Department and makes representations in favor of a given concern. The court then continues:

> It would not do for the court to say upon the introduction of evidence at this stage of the case that there is no evidence here of any service rendered by this defendant before the Post-Office Department of any substantial character. The question is, What kind of service was rendered by him; was it service by reading, or manual service, or service of his influence?
>
> The next point made is that there is no service here rendered of any kind. I think the letter of the 20th, written by the defendant to Mr. Harlan, rather denies the assertion of counsel. * * *
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> Therefore, concerning these two features of the question, * * * I do not have any hesitation in saying that there is some evidence of a service being rendered before the Department in a matter pending before that Department.
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> (P. 104.) The COURT. You may be sure that in the end the court will tell the jury that there

must not only be the receipt of money, but that it must be received as compensation for services rendered and that is all that will be stated to the jury, and the jury will find from the facts in the case.

(P. 138.) The COURT. I will say again, so there may be no misunderstanding as to the view the court has in admitting this testimony, that the letters, telegrams—this letter among others—are admitted to go to the jury to show the relations existing between the defendant in this case and the Rialto Grain and Securities Company with the view of aiding the jury in the determination of the situation which was stated by counsel in their opening as to what his true relation was, whether his relation was aiding, assisting, and rendering service before the Department, or whether his relation was entirely exclusive of that and for the purpose of acting as general counsel upon the situation. That is the sole ground upon which this letter and other letters have been admitted.

(P. 166.) It is not one transaction within the meaning of section 1782 which is involved in this case. The gist of the offense * * * is the receipt of money, the receipt of compensation; the receipt of $500 at one time for services, *if they were rendered* [italics mine], * * * would constitute an offense in and of itself. So the receipt of another $500 would be an offense in and of itself. That is the view I take of it.

(P. 195.) What I understand is finally to be submitted to the jury is whether the services were rendered in the Departments or not. It is

proper to find out what services he rendered as bearing on the question to be finally submitted to the jury.

Taking up the charge now, the court left to the jury the questions whether an inquiry was pending, as to whether the Rialto Company was violating the postal laws to enable the Postmaster-General to determine whether he should issue a fraud order, whether the accused knowingly accepted at St. Louis from the Rialto Company compensation for services of the kind set forth in the counts. The court left to the jury to determine whether the checks were paid to Burton at St. Louis or Washington (pp. 237–238).

The court called the jury's attention to the sharp issue of fact, viz: Whether the services were rendered before the Post-Office Department, or whether they were general professional services (p. 239). "Notwithstanding the fact that the accused was a Senator of the United States, he had the legal right to practice his profession in any and all of its phases, and to receive compensation therefor in any way and manner, except that he could not receive compensation for services rendered before the Post-Office Department in any matter pending there in which the United States was interested."

> And in fact the law does not prohibit him from merely rendering services in such matters before the Department. The only prohibition in this respect is against receiving compensation for such services and thereby putting himself into such relations with and under such obliga-

> tions to the person from whom such compensation is received as are usually created by that act. In determining whether he received the compensation for the services * * * before the Department, or whether he received the compensation * * * for other services, you have before you the evidence of many witnesses, correspondence between the accused and officers of the Rialto Grain and Securities Company, and all the other facts and circumstances brought out in evidence, together with all fair and reasonable inferences which may be drawn from them. * * *
>
> It is immaterial whether the services if rendered were apparently or really antagonizing or opposing the Government, or whether they were apparently or really in harmony with the interests and purposes of the Government. * * * The intent and meaning of the law obviously is that if a Senator goes before the Department to render service there to anyone in a matter pending there in which the United States is interested, he shall be under no obligation inconsistent with his rendering absolutely disinterested services in such matter. (pp. 239–240).

The court thus held the jury down to the indictment, to the inquiry before the Department, its purpose and probable result, to services in that connection, and therefore where on p. 240 it is said: "The real issue, that is, whether any services were rendered by the accused before the Department for which he received compensation," it is preposterous to suggest

that the door was opened wide to *any* services. The court meant, of course, services under the limitations which it had just expressed a moment before.

The court then proceeds to charge carefully and fully regarding the presumption of innocence, the burden of proof, and reasonable doubt. The court granted most of the defendant's requests to charge (pp. 242–244), and one of them is as follows (p. 243):

> Before defendant can be held guilty of the charge against him, *it must be proved* that he did something in connection with the investigation of the Rialto Grain and Securities Company by the Postal Department intended to influence the action of some official of that Department with respect to such investigation, and that defendant was paid and received compensation for so doing.

The court granted, among others, the following request of the defendant to charge, which plainly implies that this particular inquiry was a matter pending before the Department in which the United States was interested (p. 242):

> That whether the defendant can be adjudged guilty * * * depends upon his having received compensation for a service rendered * * * in seeking to prevent the issue of a fraud order. * * * The service must have been rendered in the Post-Office Department before some officer charged with the matter of inquiry, and must have been intended to induce such officer to report favorably upon the matter before him, or to decide some question touching a pro-

> posed or contemplated fraud order favorably to the company. The offense consists in the rendition intentionally of the service indicated and the receipt of compensation knowingly for the service so intentionally rendered.

That request then goes on to state the privilege of the defendant to make inquiries in regard to complaints, and to make reports to the company, and emphasizes again the necessity that his acts must have been intended to prevent the issuance of a fraud order, in order to show guilt.

It seems to me that this first request of the defendant to charge unconsciously concedes that an inquiry within the statute was before the Department. For it can not be doubted that at the outset a *prima facie* case leading to a fraud order was made out, and that such result was contemplated and was the object of the inquiry.

Now, it is true that the court denominated this request and the other requests of the defendant which were granted as embodying abstract propositions of law. The court's exact language is as follows:

> These are abstract propositions of law, which I give in connection with the charge *as perhaps more fully amplifying it.* I am willing to give them inasmuch as they are asked and they contain general propositions of law.

In other words, the court incorporated and merged these requests in the general charge. When he spoke of amplifying the charge thereby, he indicated plainly enough that there was no qualification or distinction

against the requests. They went to the jury and were considered, and no objection was made to this comment of the court. In asking to have the court repeat them, after the specific instructions to the jury on their return, the plaintiff in error, while indicating a general objection to that qualification of their requests—if it be a material qualification—did not except on that ground (p. 252). At all events, the court had told the jury that the requests were just as much a part of the charge as that which had been read as emanating from the court itself, and the learned judge simply refused to let the jury go back with all the accent of the case resting on a restatement of the defendant's requests.

When the jury came back (p. 246) a juror was under the impression that since Burton was employed as general counsel, such fact did not prohibit him from rendering "such service" before the Post-Office Department; what service? Why, manifestly, service such as was charged by the indictment and such as was proved. Therefore the court was entirely justified in making it clear to the jury, as was done (and a touch of asperity would not have been improper), that it was not meant that if Senator Burton was employed as general counsel, that fact permitted him to render services before the Department [that is, as I have just pointed out, services in reference to the pending matter, and to influence the action of the Department officers] for which he was to receive and did receive compensation.

> It is undoubtedly an incorrect understanding of the law, as well as of the plain meaning of the statements of the charge, to say that merely because the accused was employed as general counsel he had the right to render such services before the Post-Office Department. He had the right to go before the Post-Office Department, as I said, in substance, in the charge several times, in such a way and manner as is consistent with the principles of the law. He could go there and answer questions and make suggestions with regard to any matter that was pending there, provided he did it in a free and independent way, unaffected by the fact of receiving compensation. It would not seem that it is necessary to make further comments with respect to that matter at all (p. 248).

Considering the way in which the question came up, that is, through the sequel of the jury's return, the language of the court on page 249 is not justly open to challenge; certainly it is no ground for reversal.

Immediately afterwards (p. 250) the court said:

> The very thing which is before the jury to be considered is whether there was anything pending. It is not permitted under the law for a Senator to go before the Department when such an inquiry is made, with a view of affecting the action of the Department in the slightest way, as charged in the indictment. That is the point. I do not think the jury fully read the charge and all the instructions of the court and heeded them when such a question as this is suggested as the basis of difficulty at arriving at a verdict in the case.

And (p. 251), quoting the language of the opinion of this court in *United States* v. *Allen* (164 U. S., 492, 501), the court, rightly enough, said:

> The communication from the jury rather suggests to my mind not a failure to apprehend the law as it was laid down by the court, but it seems to be rather a disposition to think that what was laid down by the court is not or ought not to be the law.

When the thought in the inquiring juror's mind is regarded, viz, the thought that because Senator Burton was general counsel of the company he could do what he pleased, despite the facts proved and the law, this comment of the court, although hardly a rebuke, was a salutary reminder of the jury's duty.

I desire also to call the court's particular attention to the other language of the trial court on this essential feature of the case, viz, the actual commission of the substantive offense, as shown by the opinion denying the motion for a new trial in paragraphs third, fifth, and sixth (pp. 286, 287, 288 of the record). The trial court's vindication of its supplemental instructions and action upon the return of the jury (pp. 289–292) is complete and unanswerable.

I submit that when the fair import and intent of any one of Judge Adams's statements of the law is scrutinized in the light of the facts proved, and in connection with the context, no objection whatever can be found. I submit that when his whole series of rulings and his entire charge are regarded without

emphasizing or separating particular portions, it can not justly be said that he misled the jury or imposed and enforced upon them unsound propositions of law. That objection is as unfounded as the complaint that the jury was swayed by passion and prejudice (p. 278).

The gist of the offense was the receipt of compensation—not for *any* service by the individual, but for services by a Senator of the United States to the Rialto Company before the Post-Office Department in a matter pending there in which the United States was interested, viz, whether the deceiving and injurious business of the Rialto Company was imposing a fraud upon the people partly through the use of the mails, and a fraud order should therefore be issued. That was what Judge Adams meant in accentuating the receipt of compensation as the gist of the offense—as the final and completing act—and that was what our reference to his language meant.

III.

As to the meaning of the law; its enumeration and limitation.

A criminal law, as much as any other, must be interpreted according to the fair and reasonable import of its words. The intent must be found in the language. "To determine that a case is within the intention of a statute, its language must authorize us to say so" (*United States* v. *Wiltberger*, 5 Wheat., 76). But—

> Though penal laws are to be construed strictly, yet the intention of the legislature

> must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature. (*United States* v. *Lacher*, 134 U. S., 624.)

There can be no doubt, generally speaking, of the intent of Congress to make this statute far-reaching and comprehensive. Examining it rigidly, however, we find that the field on which the prohibition operates is a series of enumerated things, transactions or occurrences, in which the United States is a party or interested. They all must be pending before a Department. If, notwithstanding the enumeration, the included content is broad enough to embrace *everything* in the way of pending business in a Department in which there may be interests adverse to the United States, or whether strictly adverse or not, in which services to outside parties may be rendered, why should it be surprising that in no case whatever shall compensation be allowed from such private parties to a Government officer?

Congress was striking at an evil, and in the endeavor to make the blow telling, and yet generally to define its chief manifestations, may have circumscribed so broad a territory as to cover all current business. But why not—the services to be for compensation and Government officers to be prohibited? Yet the mind naturally seeks some meaning in the enumeration, and thinks there must be some principle of limitation. What is it? That is an experimental and speculative inquiry

after all; this case does not demand it and is well within a strict view of the categories, because it certainly exhibits a proceeding or charge or matter in which the United States is interested.

Nevertheless, in this matter let us try to point out, without expecting to resolve all possible doubts, what sort of matters are included in the specification.

First. The words used and their arrangement are not such as to lead inevitably to the view that there is a principle of distribution, the United States being regarded as a "party" even in its own Departments where the matter is criminal in nature ("accusation," "arrest," "charge"), and as interested where civil ("contract," "claim," "proceeding," "controversy"). For some of the words at least are used generally rather than technically and pass over from one division to another, or apply to both. Thus "accusation" does not necessarily or exclusively mean indictment, and might refer to a matter civil in nature and consequences; so as to "charge;" while "controversy," which ordinarily implies some dispute of a civil rather than criminal nature, might, however, include a thing which reaches into crime and prosecution.

So as to "proceeding." Usually or on the whole civil in meaning, that word is also used as to criminal prosecutions. Here was a proceeding pending before a Department surely enough—a controversy truly enough, in one sense between the Government and the Rialto Company, in another between that company and the complainants, who thought they had been

swindled or that they or others were likely to be, the controversy being whether the company was in fact doing a straight business, as its supporters alleged.

Second. The United States, it seems, is a party in the strict sense in court-martial proceedings. The United States is a party also in the Court of Claims, and those cases are pending, until finally decided, in the Department of Justice, too. If there were a criminal prosecution and submission of a request to nol-pros, either to the Attorney-General or to a United States attorney, that matter or thing in which the United States is a party would be pending *pro hac vice* before the Department of Justice.

Third. The final phrase, "other matter or thing," reaches out beyond the enumeration, and says, in effect, "if there is anything which this enumeration has omitted before a Department, in current business not disposed of, in which private parties may be served for compensation, a Federal officer or employee shall not represent them as clients and receive, or agree to receive therefor, any compensation whatever, directly or indirectly, for any services rendered or to be rendered."

There is a hint to be borrowed here from customs law in which frequently there is an enumeration followed by an omnibus clause, and where the word "including" is sometimes used to specify particularly that which belongs to the genus, and is sometimes used to add to the general class a species which does not naturally belong to it. (*Hiller* v. *United States*, 106

Fed. Rep., 74; *In re Merchandise*, etc., 75 Fed. Rep., 998; *Hills Bros.* v. *United States*, 99 Fed. Rep., 264.)

But, after all, when the proceeding or matter or thing before the Department is a regular inquiry, duly initiated under the law and regulations to determine whether statutes have been violated, and whether either the administrative or the criminal remedy or both shall be applied, can these general and speculative doubts as to the whole extent and precise limits of the law lead us to say that there was nothing pending under the enumeration in which the United States was interested?

IV.

As to the nature of the required "interest."

I think my original brief says sufficient about the abstract concerns, manifestly concerns of the greatest moment, in which the United States is vitally interested. I also said that some of these intangible interests often run to a property or money interest, if not immediately and visibly, yet ultimately. Thus fraud in imposing an unfit clerk on the Government would give less efficient service, and it does not require abstruse mathematics to see that that affects the United States Treasury. But there is, as was suggested by a question from Mr. Justice Holmes, a much clearer application of that idea here.

Inasmuch as a fraud order stops mail matter and cuts off certain letters (registered letters) to an offending addressee, who often is in a large way of business, the

revenues of the United States are diminished and its property interests are concerned. The Government is interested in that narrower sense. Again, since a fraud order proceeding may very likely lead to prosecution under section 5480, that result being always contemplated as possible in such inquiries, and as the punishment under that section includes a fine of five hundred dollars, there, too, the United States is interested in the limited sense. A very considerable part of the Government revenue is made up of fines, penalties, and forfeitures.

No branch of any Executive Department more closely affects the people than the postal service. It is the great artery and vehicle of communication between the people. It is the means and agency of the people in conducting many and varied enterprises. Congress has in appropriate legislation recognized the great opportunity afforded unprincipled, dishonest, and evil-disposed persons to carry out their various schemes through the medium of this Government agency, by imposing upon the Postmaster-General the all-important duty of purging the mails of all such schemes. He does this "on evidence satisfactory to him." Congress has provided him with certain representatives, namely, post-office inspectors, whose duty it is, among other things, to gather this evidence. The Postmaster-General must of necessity rely largely upon the report of these inspectors.

When complaint is made that the mails are being used in furtherance of a lottery or scheme to defraud,

if such complaint is found to make out a *prima facie* case, it is turned over to an inspector for investigation and report.

From that moment there is a matter pending before the Department in which the United States is vitally interested, namely, whether or not a fraud order, so-called, shall issue. Can it be successfully maintained that a member of Congress may appear before the chief post-office inspector in the capacity of a paid attorney, and through his influence obtain from that official a report favorable to his client, and not violate this law?

It will probably be conceded that if he should appear before the Postmaster-General in the capacity of a paid attorney and argue against the issuance of a fraud order, he would in so doing violate the law. How, then, can it be contended that he does not violate the law by appearing before a subordinate while the case is in process of investigation, when by so doing his influence may be more potent and fruitful than it would be at any other stage of the proceeding?

The United States is interested in such an investigation and proceeding also for the reason that under the law the use of the mails in furtherance of a lottery or scheme to defraud is a crime. This is well known to the public, who accept the fact that any person or company is permitted to use the mails as *prima facie* evidence that such person or company is conducting an honest enterprise. Obviously the United States can not consistently permit the use of its mail

service in the dissemination of literature concerning lotteries or schemes to defraud when in so doing it would indirectly be a party to the fraud.

In the case of *McGregor* v. *United States*, recently decided in the circuit court of appeals for the fourth circuit (not yet reported), McGregor, an employee of the Government, had been convicted for conspiracy to defraud the Government by the acceptance of part of the purchase price of a certain article sold the Government through him. It was contended that, since the price paid by the Government for this article was no more than would have been paid for a similar article of no better grade or value, the Government was not defrauded. The court held otherwise, and said:

> It may be true that no pecuniary loss would follow the consummation of the conspiracy, and still the result might be that the damage to the Government would be serious and far-reaching. The language of the statute clearly contemplates that the loss or damage may be other than a pecuniary one, susceptible of accurate calculation. The words "in any manner or for any purpose" [sec. 5440, R. S.] are most comprehensive and show that the intention of the lawmaking power was to have the statute as broad and as comprehensive as it could possibly be. It surely is a wrong, and a great injury to the Government, when any officer or employee of one of its Departments conspires with another to do an act the inevitable result

of which will be to corrupt the efficiency and impair the usefulness of such Department.

To hold that such conduct would not be a fraud upon the Government and a loss to it would be as reprehensible as such conduct itself. This statute has, in a number of well-considered cases, been given the construction placed upon it by the court below, and such construction has our approval.

United States v. *Bunting et al.*, 82 Fed., 883; *United States* v. *Curley et al.*, 122 Fed., 738; *Colladay* v. *Palmer*, 18 App. (D. C.), 426; *Tyner and Barrett* v. *United States*, App. (D. C.).

I said nothing in aspersion of the eminent Senators and lawyers whose names were mentioned at the oral argument and who took part in the debate on the original law and endeavored to prevent the manifest injustice of forbidding practice by members of Congress and other public officers before the courts; that is, before the *judicial* department of the Government. I said that the law—meaning the general scheme and purpose of the law—was extorted from an unwilling spirit by the better sentiment, and I think that is true.

V.

As to intangible influence.

It would be either a very thoughtless thing or a serious and unworthy thing for a Senator of the United States, being counsel for a railway company (I refer to one of the suggestions from the bench), to send his card showing that relation to the head

of a Department in which his company had pending business which could be served. But the mere sending of such a card would not be *service*, I think, within the meaning of the law (practical and substantial always), although the intent of such Senator might be covert and evil. It would hardly do to file an indictment on that alone. Here there was far more—a series of connected acts, no one of them slight and unimportant, an insidious and subtle course of dealing which distinguishes the case of the actual Senator from the supposed one not only in degree but in kind.

There were visits, inquiries, representations, arrangements for hearings, "looking out at this end of the line," persistent championing of the Rialto Company's interests, so that no one engaged in that branch of the Government service could fail to know that a powerful, assiduous, and watchful Senator was the counsel of the company; was assuring the Department that they were doing a "straight" business, that they would comply with the rules; was keeping the Department in good humor with Dennis, the president; was implying at least that complaints were unfounded, because the essential inference from his inquiries about the bogus inspectors was that the company was, of course, all right and such people were merely trying to blackmail it. Would not these things, and the other similar activities shown by the record, naturally influence the Government officers?

They did influence the officers, and although a fraud order ought to have been issued promptly it was not,

owing to Senator Burton's interposition. For all the ignorance of the Senator (as claimed) of the string of complaints after the first two, his protest, that he will not appear before the Department or sustain his clients against the will of the Department, and notwithstanding the assertion of mere "inquiries," cautious and proper, he tells Mahaney in McRae's presence, who confirms the statement, that everything is cleaned up at Washington, that there is nothing pending before the Department against the company of a serious nature.

Mr. Burton's traces were well covered. His assertions on behalf of himself and his client make a fair outside, but he held up the investigation because he was Senator, and not only because he was general counsel of the Rialto Company; and the portions of the judge's charge animadverted on at bar were perfectly accurate and just. If not, the most dangerous evil in this entire situation, viz, that intangible, subtle, and insidious thing, "influence," can never be reached even where the receipt of compensation is plainly shown.

VI.

Jurisdiction here and below, and section 731, Revised Statutes.

AS TO JURISDICTION IN THIS COURT.

I may have gone too far in stating in my original brief that there was not a shred of reason for contending that a constitutional question was presented justifying a direct appeal under section 5 of the judiciary

act of 1891. It may be that I gave too little attention in that connection to the question of privilege; but I repeat that it was waived—that they gave it away too prodigally, so to speak—and now are attempting to recall it and set it up as a ground for immediate review in this court.

The assignments of error do not specify it, and while it appeared in the motion in arrest of judgment and the grounds thereof were formally saved by an assignment alleging error in overruling it, I contend that this is not enough to make that question a ground for taking jurisdiction. If the court think otherwise, or if the court see fit to issue certiorari at this stage, there is an end of the question.

AS TO JURISDICTION BELOW.

In *Horner* v. *United States* (143 U. S., 207), Mr. Justice Blatchford, delivering the opinion of the court, after setting out section 731, said (p. 212):

> The words "judicial circuit" in that section are probably printed by a clerical error for "judicial district," as, in section 30 of the act of March 2, 1867 (c. 169, 14 Stat., 484), from which section 731 is taken, the words are "judicial district."

The mistake was regarded as so apparent that both in *In re Palliser*, 136 U. S., 257, 266 (Mr. Justice Gray), and *Putnam* v. *United States*, 162 U. S., 687, 708 (Mr. Justice White), the court, in setting out the statute, substitutes the word "district" therefor.

In the Compiled Statutes of the United States, volume 1, page 585, the compiler, in a note to section 731, states that the word "circuit" was used by mistake.

If the change had been deliberate and intentional, Congress would hardly have omitted to change the word "district" in the succeeding clause, "may be dealt with, inquired of, tried, determined, and punished in either *district*."

Besides, no sensible reasoning can be offered for such a change. Counsel for plaintiff in error attempt none. The constitutional provision as to trial refers to the "district" where the crime shall have been committed, not "circuit."

Section 731 does not occur under chapter 5, "Judicial circuits," of Title XIII, as the brief of plaintiff in error indicates, but under chapter 12, "Provisions common to more than one court or judge."

In *United States* v. *Haskins*, 3 Sawy., 262; Fed. Cas. 15322 (1875, district court, D. California), it was held that a removal might be made from a district within a State to a district within a Territory under section 33 of the judiciary act of 1789, now section 1014 of the Revised Statutes. In that case Judge Hillyer said:

> Thus these courts [circuit and district courts of the United States and Territorial "district courts," referring to the organic act of Utah] have cognizance of all offenses committed in their respective districts, and as such an offense can only be tried in the district where it is committed, the offender, if he escapes from the Ter-

ritory, must go unpunished unless he can be removed there for trial; and this only can be done under and by virtue of the provisions of the judiciary act. No other provision of law for such a case can be found, and it does not seem probable that Congress has left it wholly unprovided for.

Again:

It is doubtless true that the provisions of the judiciary act are, for the most part, confined in their application to courts of the United States in the sense of the Constitution. In *Hornbuckle* v. *Toombs* (18 Wall.), it was held that the clause in the organic act of a Territory extending the laws of the United States over the Territory had the effect to import laws of a general character and universal application; but whether, when acting in the capacity of United States circuit and district courts, invested with the same jurisdiction in all cases arising under the Constitution and laws of the United States, the Territorial courts were to be governed by any of the regulations affecting the circuit and district courts of the United States was a question stated but not decided. Now, the provisions of section 33 are of universal application, and are plainly intended to cover every offense against the United States committed within the jurisdiction of any of its courts.

This reasoning applies with equal force to the present case.

The act of February 21, 1871, chapter 62, section 34 (16 Stat., 419, 426), providing a government for the District of Columbia, contained this provision:

> The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the District of Columbia as elsewhere within the United States.

This provision afterwards became section 93 of the Revised Statutes of the District of Columbia.

By section 1 of the act of March 3, 1901, c. 854 (31 Stat., 1189), establishing a code of law for the District of Columbia, it is provided that certain statutes shall remain in force in the District, among others, "*all general acts of Congress not locally inapplicable in the District of Columbia*, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States."

By section 61 of the District Code (31 Stat., 1199) it is provided that the supreme court of the District of Columbia—

> shall have the same powers and exercise the same jurisdiction as the circuit and district courts of the United States, and shall be deemed a court of the United States, etc.

There is every reason, therefore, for holding that section 731 is applicable to the District of Columbia. It is a judicial district, and both as regards jurisdiction and power the supreme court of the District of Columbia is in all respects similar to the circuit and district courts of the United States.

As the district court held, the gist of the offense is the receiving of compensation. The place where compensation is received is therefore the place where the

offense is completed. There has never been any doubt that where an offense was begun in one district and completed in another, it could be tried in the latter district.

In *Palliser's case* (136 U. S., 257), Mr. Justice Gray, delivering the opinion of the court, said (p. 265):

> It is universally admitted that when a shot fired in one jurisdiction strikes a person in another jurisdiction the offender may be tried where the shot takes effect, and the only doubt is whether he can be tried where the shot is fired [citing cases].

The plaintiff in error was not tried in the District of Columbia for an offense alleged to have been begun here and completed elsewhere, but he was tried in the eastern district of Missouri for an offense *completed* there, and, in the eye of the law, independent of section 731, committed there.

If the payment of the checks in question was not made in St. Louis, but at Washington, as plaintiff in error contends, then the district court had no jurisdiction upon any ground, because in that case, since the services were rendered before the Post-Office Department at Washington, the offense would have been entirely consummated here. But the Government contends that, as stipulated, the checks were *paid* at St. Louis. Besides, there is no question that the last payment was made in cash at St. Louis.

On this branch of the case two questions were asked at the oral argument by members of the court, to which I desire to refer further. Referring to the argu-

ment that under the banking custom proved, by which the Riggs Bank was Burton's agent for collection, notwithstanding the immediate credit, and the checks were paid to Burton at St. Louis, Mr. Justice White inquired whether the amount of the check could have been set off as against the Riggs Bank by the Commercial Trust Company in case Burton was indebted to the Trust Company.

If the Riggs Bank were collection agent, as we contend, that could have been done. If it had been attempted, I have no doubt a lawsuit would have resulted. The Riggs Bank, however, on notice through the series of collecting banks that the Commercial Trust Company had applied the amount to Burton's indebtedness and would not account through the clearings, would have accepted this result of its relation as agent readily enough, I surmise, would have charged the item back and been sued by Burton, probably, on the theory of a sale. I imagine they would not have risked an overdraft or ever given immediate credit if Burton's balance were low and his credit weak.

But despite the hypothetical case the fact remains that we proved the usage, and under the usage the check was paid at St. Louis to the payee by the drawee at St. Louis through the Riggs Bank as agent for collection.

Mr. Justice Day asked what would have been the situation under our theory—that is, was Burton paid, and could we have prosecuted him—if payment of the

check had been stopped or the drawee bank had failed. The answer to that question, I think, is this: There would not have been payment at St. Louis, of course, and the district court there would not have had jurisdiction. The item would have been returned and charged back to Burton's account, and he would have had a right of action in the respective cases either against the drawer or against the assignee or receiver of the drawee. The Government would then probably have proceeded against him in Washington. There would have been no *payment*, no receipt of the money on that item at St. Louis, but a thing of value would have been received at Washington. The language of the statute is "receive or agree to receive *any compensation whatever, directly or indirectly.*" Compensation may be other than cash, and may not require technical *payment.*

It may be other than a demand banking item, which ordinarily is paid somewhere in due course. In that case it would turn out that the intention was apparently abortive, but Mr. Burton would have received in Washington property, a thing of value having a right of action attached to it, and pending his endeavor to enforce payment of his check the Government would probably have sued him in the District of Columbia.

But are we bound to pursue the speculative inquiry to these remote ends? Is the logic of our main position unsound because some doubts might be expressed as to all its possible consequences? Proving the usage

as to a transaction in which the check *was* paid, can we not stand on that payment even if in other imagined events a conflict of interest might challenge our theory in the courts?

It must not be forgotten that the *cash* was paid to Burton in person at St. Louis. Additional authorities on the point that one good count will sustain a judgment of conviction are: *Claassen* v. *United States*, 142 U. S., 140; *Evans* v. *United States*, 153 U. S., 584, 595, 609; *Goode* v. *United States*, 159 U. S., 669; *Ballew* v. *United States*, 160 U. S., 197; *Selvester* v. *United States*, 170 U. S., 262, 267, 268; *Putnam* v. *United States*, 162 U. S., 687.

VII.

Is the Privilege purely personal, or is the Public interested?

Mr. Justice Peckham asked the question whether the constituents of a member of Congress are not interested in his presence at duty and without interruption in the Senate or House, thus suggesting a doubt as to whether the privilege is merely personal and competent to be waived. Constituents *are* interested in being represented in the legislature at all times during a session, but they are first of all interested in being properly represented, and a man under indictment is not fit to represent them. Therefore, the public as well as the individual is also interested in having the privilege waived and the charge determined as promptly as possible, and no doubt that obvious motive is one reason why Senator Burton himself urged immediate trial.

Furthermore, promptness and waiver are requisite for another practical reason. It is understood to be an unwritten law of the Senate that it will *not* take action within its own power to discipline or expel a member, only in case a member under indictment does not appear on the floor of the Senate while any such charge in the courts remains undetermined in his favor. Two courses only are open to a Senator in such case, either to waive the privilege and proceed immediately to trial on his own initiative, or else to resign and give the electors an opportunity to select a representative who is fit.

HENRY M. HOYT,
Solicitor-General.

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